

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JEFFERY BRADLEY,)	
)	No. CV 07-1870-HU
Plaintiff,)	
)	
v.)	FINDINGS AND
)	
MAX WILLIAMS, et al.)	RECOMMENDATION
)	
Defendants.)	
)	

Jeffery Bradley
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Eugene, Oregon 97402
Pro se

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HUBEL, Magistrate Judge:

The matter before the court is defendants' unenumerated motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground that plaintiff has failed to exhaust his

1 inmate grievance remedies. (Doc. # 29).

2 **Factual Background**

3 Plaintiff Jeffery Bradley is a former inmate at Snake River
4 Correctional Institution (SRCI). He brings this action pro se,
5 asserting claims under 42 U.S.C. § 1983, alleging that defendants,
6 Oregon Department of Corrections (ODOC) supervisors and staff,
7 failed to protect him from the risk of serious harm while he was an
8 inmate at SRCI. The named defendants are Max Williams, Director of
9 ODOC; Jean Hill, Superintendent of SRCI; C. Schultz, an
10 administrator at SRCI; Ron Barras and Jason Rux, correctional
11 officers at SRCI; and a John Doe.

12 Bradley alleges that in December 2005, while using the gym
13 billiards room in an area designated Complex 3 (C3), he was
14 assaulted by another inmate, Lockhart, as a result of which he lost
15 a substantial portion of his left ear. Complaint ¶¶ 10-13. He
16 alleges further that despite his requests to be housed elsewhere,
17 the decision was made, after Bradley left the infirmary, to again
18 house him in C3. On February 19, 2006, Bradley was assaulted again,
19 by a different inmate, in the C3 dining area. He suffered a
20 fractured nose. After that incident, Bradley was housed in a
21 different area of SRCI. Id. at ¶¶ 14-16.

22 Bradley asserts that the defendants had actual knowledge of
23 the substantial risk of serious harm to inmates at SRCI from other
24 inmates while using the C3 gym and other areas within C3, where
25 prisoners were not adequately supervised. Id. at ¶ 22. He claims
26 that policies and customs have been developed and pursued that

1 created the substantial risk of harm to inmates at SRCI, including
2 failure to 1) hire sufficient staff; 2) adequately train staff; 3)
3 report and document threats made to inmates; 4) take steps after
4 inmate assaults to determine whether staff misconduct led to the
5 assault and whether remedial action was necessary; and 5)
6 discipline staff. Id. at ¶ 24.

7 On January 31, 2006, Bradley filed a grievance, labeled
8 2006.02.001, complaining that the assault by Lockhart "would not
9 have happened had staff or security devices such as cameras been
10 present." Id. The grievance also stated that Bradley was being
11 punished "by receiving unequal food and day room hours" in the
12 infirmary, as compared to the general population. Affidavit of
13 Teresa Hicks, Attachment 3. A response to the grievance, signed by
14 Lt. R. Hults and dated February 16, 2006, states that

15 [t]here are cameras in the gym that do view a small
16 portion of the pool room and as you well know that [sic]
17 if you want to be involved in a fight there is nothing
18 whether it be cameras or staff that can stop a fight from
19 taking place. Cameras are great if someone is monitoring
20 them at the moment the fight takes place but that still
21 doesn't stop the action from occurring. After completing
22 the interviews and reviewing the pool room area I see no
23 fault of ODOC but find that your actions are the reason
24 that this happened.

25 Id. at Attachment 4.

26 Bradley appealed the grievance to the second level on March 1,
27 2006, alleging that Lt. Hults

28 failed to address unequal treatment in the infirmary
housing which was a form of punishment, less day room
than [general population], 3 showers a week, 4:30 a.m.
wakeup ... 2 hours earlier than general population.

Id. at Attachment 5. In response to a question on the form asking,

1 "Describe what action you want taken to resolve the grievance
2 appeal. (How can the problem be solved?)," Bradley responded:

3 Full compensation and equal treatment in the infirmary
4 housing, equal day room privileges, at the minimum 5
5 showers a week for those that can shower without
6 assistance & 6:30 wakeup.

7 Id. The grievance appeal continued,

8 SCRI security staff was negligent in their supervision of
9 inmates ... on the day in question. Had SRCI staff been
10 present they would have been able to promptly intervene
11 as they did ... when I was again assaulted on 2-19-06.
12 Had staff been doing their job SRCI officials would know
13 exactly what happened in the pool room on 12-29-05. If
14 video equipment were in place officials could simply
15 review the footage. All the more reason to implement
16 video equipment into the billiard rooms for future
17 reference.

18 * * *

19 Lt. Hults neglected to address unequal treatment in the
20 infirmary.

21 Id.

22 On March 21, 2006, Bradley received a memorandum from
23 defendant Jean Hill, Superintendent of SRCI, responding to the
24 grievance appeal. Id. at Attachment 6. The memorandum states that
25 Teresa Hicks, Grievance Coordinator, was assigned to investigate
26 the complaint. Id. The response continues,

27 There was [sic] three staff supervising the Complex 3 gym
28 area on the day this altercation occurred. Unfortunately,
29 fights may still occur even with staff presence and
30 security cameras.

31 Inmates assigned to the Infirmary are not allowed the
32 same privileges as those assigned to General Population.
33 Like hospitals in the community, there are strict patient
34 guidelines designed to create the optimum environment ...
35 to recover. ...

36 In any setting, there is no guarantee of complete safety.
37 In a prison environment there is an understood inherent

1 risk for inmates and staff members. However, there are
2 many security practices in place to reduce the risk. ...
3 There are also a number of surveillance cameras
positioned throughout the institution. ...

4 There is no substantiation that staff failed to protect
5 you. ... When staff became aware of the altercation, they
6 immediately responded to the situation. Your medical
concerns were addressed and you were transported to the
community hospital for further evaluation and treatment.

7 Id.

8 Bradley filed a second appeal of his grievance on March 30,
9 2006. Hicks Declaration, Attachment 7. In the section of the form
10 asking, "Describe what action you want taken to resolve the
11 grievance appeal. (How can the problem be resolved?)", Bradley
12 wrote, "Full compensation & daily showers for those housed in the
13 infirmary with a change of underwear." Id.

14 The second appeal contained Bradley's observation that on the
15 day he was assaulted by Lockhart, one member of the prison staff
16 was on the computer and the other two were standing against the
17 wall talking. Id. Bradley stated that the three staff members

18 compromis[ed] the safety & security of the facility by
19 failing to monitor inmate activity in an area they knew
20 was unsecure. Yet SRCI officials continue to allow
21 inmates access to this area is a deliberate indifference
to the health & safety of prisoners & is a breach of
their duty to protect prisoners from unreasonable risk of
assault by another inmate.

22 Id. The second appeal also dealt with the complaint about inmates
23 housed in the infirmary receiving only three showers a week. Id.

24 SRCI Assistant Director Stan Czerniak responded to the second
25 appeal on May 15, 2006. Hicks Affidavit, Attachment 8. Mr. Czerniak
26 repeated the institution's reasons for not giving inmates assigned
27 to the infirmary the same privileges as prisoners assigned to the

1 general population, and noted that "[h]ousing records reflect you
2 have been released from the infirmary and are currently living in
3 G[eneral] P[opulation]." Id. With respect to the complaint about
4 the three staff members in the gym at the time of the assault by
5 Lockhart, Mr. Czerniak wrote:

6 According to Security Management staff, there was three
7 staff assigned to the gym area on the day this
8 altercation occurred. You alleged that two staff was
9 [sic] standing against the wall talking and one Officer
10 was using the computer. It is reasonable that staff use
11 the computer system and talk to one another as they can
12 verify inmate information such as medical needs, housing,
13 security risks, etc. Surveillance cameras do not
14 guarantee that an altercation would be prevented. Cameras
15 would have provided video evidence on exactly what took
16 place, but is not [sic] necessarily a deterrent for
17 misconduct.

18 [This] incident has been reviewed and there is no
19 indication that staff acted with indifference or outside
20 guidelines.

21 Id.

22 On March 27, 2006, Bradley filed a grievance relating to
23 SRCI's failure to house Bradley somewhere other than C3 after he
24 was assaulted by Lockhart, and stating that he had been assaulted
25 on February 19, 2006 in C3. Hicks Affidavit, Attachment 9. Bradley
26 wrote, "SRCI officials were aware of the threat to my safety by
27 fellow inmates and acted with a 'deliberate indifference' towards
28 my safety by failing to rehouse me in a different area of the
institution." Id. Bradley requested compensation for his injuries.

Id. The grievance was rejected as untimely on April 6, 2006, by
Teresa Hicks. Hicks Affidavit, Attachment 10. Ms. Hicks wrote:

The original grievance dated 3/27/06 and received 3/30/06
is being returned to you without action. ... Even though
it is too late to file a grievance, you can address your

1 concerns with either Captain Milhorn or the Security
2 Manager. (Note: there is no compensation available
through the grievance process.)

3 Id.¹

4 **Discussion**

5 Defendants move to dismiss on the ground that Bradley failed
6 properly to exhaust his administrative remedies, as required by the
7 Prison Reform Litigation Act (PLRA), 42 U.S.C. § 1997e(a), which
8 provides that "no action shall be brought with respect to prison
9 conditions under Section 1983 of this title or any other Federal
10 Law, by a prisoner confined in any jail, prison, or other
11 correctional facility until such administrative remedies as are
12 available are exhausted." Defendants assert that Bradley's
13 grievance number 2006.02.001 was defective because 1) it requested
14 review of two separate issues, the assault by Lockhart and the
15 conditions in the infirmary, even though ODOC regulations prohibit
16 inmates from grieving more than one issue per grievance, see OAR
17 291-109-140(1)(a); and 2) it failed to identify the individuals now
18 named as defendants in this action, which defendants assert is
19 contrary to OAR 291-109-140(1)(f) ("An inmate may only obtain
20 grievance review of one DOC or OCE employee's actions/decisions on
21 a single grievance form."). Additionally, defendants assert that
22 Bradley failed to file a timely grievance with respect to the claim
23 based on defendants' failure to rehouse Bradley after the assault
24 by Lockhart.

25
26 ¹ Under ODOC administrative rules, an inmate grievance, if
27 not an emergency, must be submitted within 30 working days of the
incident. OAR 291-109-0140(3).

1 Failure to exhaust administrative remedies is an affirmative
2 defense which must be raised and proved by the defendants. Jones v.
3 Bock, 549 U.S. 199, 216 (2007). If the court finds that the inmate
4 has failed to exhaust administrative remedies, the proper procedure
5 is for the court to dismiss the case without prejudice. Wyatt v.
6 Terhune, 315 F.3d 1108, 1117 (9th Cir. 2002).

7 The exhaustion requirement applies to all inmate suits
8 concerning prison conditions, whether they involve general
9 circumstances or particular episodes. Porter v. Nussle, 534 U.S.
10 516 (2002); see also Bennett v. King, 293 F.3d 1096 (9th Cir. 2002).
11 The exhaustion requirement of the PLRA means "proper exhaustion,"
12 Woodford v. Ngo, 548 U.S. 81, 93 (2006), which the Supreme Court
13 has defined as compliance with the system's critical procedural
14 rules, including timeliness requirements. Id. at 90. See also
15 Jones, 549 U.S. at 217-18 ("Woodford held that 'proper exhaustion'
16 was required under the PLRA, and that this requirement was not
17 satisfied when grievances were dismissed because prisoners had
18 missed deadlines set by the grievance policy.")

19 Bradley has not properly exhausted either of the claims
20 asserted in his complaint. The claim that ODOC staff failed to
21 protect him from the risk of serious harm at the time of the
22 Lockhart assault is procedurally defective because grievance number
23 2006.02.001 contains more than one complaint--and in fact appears
24 to focus primarily on conditions in the infirmary. Moreover, the
25 grievance fails to identify any individual against whom the
26 grievance is brought. Although the PLRA does not impose a "name all

1 defendants" requirement, see Jones 549 U.S. at 218("[E]xhaustion is
2 not per se inadequate simply because an individual later sued was
3 not named in the grievances"), proper exhaustion requires
4 compliance with prison grievance procedures. Id. (it is the
5 prison's requirements, not the PLRA, that define the boundaries of
6 proper exhaustion.) ODOC grievance procedures, OAR 291-109-0140(f),
7 provide that an inmate may only obtain grievance review of one DOC
8 or OCE employee's actions/decisions on a single grievance form.

9 The grievance brought on March 27, 2006, relating to ODOC's
10 failure to heed Bradley's request to be housed elsewhere, is
11 procedurally defective because it was untimely.

12 None of Bradley's claims with respect to policies and customs
13 that fail to provide adequate staffing levels and staff training,
14 to report and document threats made to inmates, or to discipline
15 staff, have been the subject of grievances.

16 I conclude, therefore, that this action should be dismissed
17 without prejudice because Bradley has failed to exhaust his
18 administrative remedies as required by the PLRA.

19 Conclusion

20 I recommend that defendants' unenumerated Rule 12B motion to
21 dismiss (doc. # 29) be GRANTED, and that this action be dismissed
22 without prejudice.

23 Scheduling Order

24 The above Findings and Recommendation will be referred to a
25 United States District Judge for review. Objections, if any, are
26 due December 31, 2008. If no objections are filed, review of the
27

1 Findings and Recommendation will go under advisement on that date.
2 If objections are filed, a response to the objections is due
3 January 14, 2009, and the court's review of the Findings and
4 Recommendation will go under advisement with the District Judge on
5 that date.

6 Dated this 16th day of December, 2008.

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8
9 /s/ Dennis James Hubel

10 Dennis James Hubel
11 United States Magistrate Judge
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